STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRECE R. WELCH,

Defendant-Appellant.

UNPUBLISHED
June 13, 2000

No. 205973
Recorder's Court
LC No. 97-500424

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and sentenced to a term of 7-1/2 to 20 years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that he is entitled to a new trial because trial counsel was ineffective at the entrapment hearing. We disagree. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant claims that trial counsel was ineffective by failing to call the informant, who allegedly would have supported defendant's claim that he was pressured into committing the crime. The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Michigan courts use the objective test of entrapment. *People v Juillet*, 439 Mich 34, 53; 475 NW2d 786 (1991); *People v Turner*, 390 Mich 7, 22; 210 NW2d 336 (1973). The question is whether the actions of the police were so reprehensible under the circumstances that the court should refuse, as a matter of public policy, to permit the conviction to stand. *Id*. "Entrapment occurs when (1) the police engage in impermissible conduct which would induce a person similarly situated to the defendant and otherwise law abiding to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court." *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999).

Initially, we note that defendant failed to attach an affidavit from the informant identifying the specific testimony that he would have given at the entrapment hearing. Moreover, based on the evidence that was presented, there is no reasonable likelihood that the informant's testimony would have made a difference because defendant's own testimony supported the court's finding that there was no entrapment. In particular, defendant admitted that he sold cocaine to the undercover police officer pursuant to an arrangement made by the informant. Although defendant testified that he refused the informant's request to sell him drugs on two or three prior occasions over the course of three to four weeks, he admitted that he "finally gave in" to participating in the transaction. Defendant further admitted that, in arranging the sales transaction, the informant did not ask him to do any favors or "beg him." Rather, defendant agreed to the transaction because he was in the midst of financial difficulties, including potentially being evicted from his residence. Moreover, upon defendant's arrest, an additional 8.3 grams of cocaine was found in his car. Additional drugs were also found at his apartment and his mother's house, as well as three measuring scales, a bulletproof vest, and a gun. Defendant admitted ownership of the drugs found in his apartment and his car. In a previous written statement to the police, he also admitted ownership of the measuring scales, the gun, and the bulletproof vest.

Under the circumstances, there is no indication that counsel's failure to call the informant to testify deprived defendant of a substantial defense or affected the outcome of the entrapment hearing. *Daniel, supra; Kelly, supra*. Rather, the evidence shows that the police did nothing more than present defendant with the opportunity to commit the crime, which does not amount to entrapment. *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994). We have previously held that "mere requests to sell contraband, even repeated requests, are not conduct likely, when objectively considered, to induce the commission of the crime by a person not ready and willing to commit it." *People v Crawford*, 143 Mich App 348, 356; 372 NW2d 550 (1985), aff'd 429 Mich 151 (1987). We also note that decisions regarding whether to call witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and this Court will not substitute its judgment for that of counsel regarding such matters. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant next claims that trial counsel was unprepared for the entrapment hearing because he failed to discover certain police surveillance notes from the day before the incident that led to his arrest. When claiming ineffective assistance due to counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Here, defendant has not produced the surveillance notes for this Court's review,

nor has he sufficiently identified what prejudice he suffered as a result of trial counsel's failure to discover the surveillance notes. Accordingly, this issue is without merit. *Id*.

Defendant also claims that counsel was ineffective because he failed to object to the alleged hearsay testimony of the undercover police officer that the informant told him that defendant was a cocaine dealer, that defendant and the informant were not close friends, that the informant previously bought drugs from defendant, and that defendant wanted to wait until he got off work to sell the drugs. We have reviewed the alleged hearsay statements, as well as the unchallenged evidence admitted at the entrapment hearing. We conclude that, based on the evidence presented, particularly defendant's own testimony, it is unlikely that, but for counsel's failure to object to the alleged hearsay, the result of the entrapment hearing would have been different. *Pickens, supra*. Accordingly, defendant is not entitled to any relief on this basis.

II

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial, based on the claim that trial counsel was ineffective for not calling the informant to testify at the entrapment hearing, without holding an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Again, we disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Here, defendant has failed to demonstrate that testimony was required from trial counsel to supplement the record in order to determine whether counsel was ineffective for failing to call the informant as a witness. Based on defendant's own testimony, it was apparent that defendant was not entrapped, and that the informant's testimony would not have aided him in presenting an entrapment defense.

In the alternative, defendant claims that he was denied his right to the effective assistance of appellate counsel because appellate counsel failed to attach defendant's affidavit showing the informant's alleged testimony in support of the motion for a new trial. However, we have reviewed defendant's affidavit and conclude that it fails to demonstrate that he is entitled to a new trial. Moreover, during the hearing on defendant's motion for a new trial, appellate counsel indicated to the court that it could procure certain affidavits, but the court replied that no affidavits were necessary for it to decide defendant's motion. Accordingly, defendant has failed to demonstrate that appellate counsel's performance was deficient under an objective standard of reasonableness and that the deficiency prejudiced him. *Pickens, supra*.

III

Finally, we also reject defendant's claim that the trial court erred when it refused to order the prosecution to produce the informant for the entrapment hearing. It is undisputed that defense counsel knew the identity of the informer, but simply chose not to subpoena him to testify. In such a situation, the trial court's refusal to order production of a known informant is not clearly erroneous, particularly

where the defendant does not base his request on a res gestae issue. See *People v Lucas*, 188 Mich App 554, 572-573; 470 NW2d 460 (1991).

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens